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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 173

JACK WALKER, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

On April 14, 1936, an indictment in two counts was returned against the petitioner and another in the District Court for the Northern District of Texas. The first count charged robbery of a national bank by force and violence and by putting certain employees in fear. The second count charged the defendants with using a dangerous weapon in committing the offense described in the first count (R. 12–15). After the jury was sworn and the indictment read the petitioner, on April 28, 1936, entered a plea of guilty (R. 16). On May

1, 1936, the petitioner was sentenced to imprisonment for 12 years (R. 18) and is now confined at the United States Penitentiary at Alcatraz, California (R. 24–25).

On March 28, 1939, the petitioner filed in the District Court for the Northern District of California a petition for writ of habeas corpus in which he alleged that he was deprived of his liberty in violation of the Sixth Amendment because he did not know that he was entitled to counsel when the proceedings under the indictment took place, was not so advised by the trial court, and did not waive such right (R. 3–6). Attached to the petition were the indictment, judgment and sentence, and the commitment (R. 7). The District Court entered an order to show cause why the writ of habeas corpus should not be issued as prayed and copies of this order were served upon the respondent and upon the United States Attorney for the Northern District of California (R. 9). A return was filed on behalf of the respondent (R. 10–11) to which there was annexed and made part thereof as exhibits, among other papers, three affidavits, one by the United States Attorney for the Northern District of Texas, another by an Assistant United States Attorney for that District who aided in the prosecution of petitioner, and the third by a United States probation officer who at the time of the criminal proceedings against the petitioner was a Deputy Marshal for the Northern District of Texas

(R. 26–31). These affidavits, which are summarized at some length in the opinion of the Circuit Court of Appeals (R. 50–51), stated, in effect, that the petitioner told each affiant that he was guilty and did not want an attorney.

Following the filing of this return the District Court appointed counsel for the petitioner (R. 32). This attorney signed and filed on behalf of the petitioner an answer to the respondent's return (R. 33–37), also summarized at considerable length in the opinion of the Circuit Court of Appeals (R. 50–51). In this answer the petitioner contradicted the allegations contained in the affidavits annexed to the return respecting the petitioner's alleged waiver of counsel and made other allegations with reference thereto. Annexed to the answer and made a part thereof as an exhibit was a letter from the Deputy Clerk of the court which sentenced petitioner relating to the practice followed in connection with the appointment of counsel for indigent defendants (R. 38). After a hearing at which counsel for the petitioner was present and submitted argument, the District Court denied the application for writ of habeas corpus, discharged the order to show cause, and dismissed the petition (R. 39). An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit (R. 40–43), which unanimously affirmed the order of the District Court (R. 49–54) and denied a petition for rehearing (R. 55).

It is contended by the petitioner that the procedure followed by the District Court was contrary to that prescribed by the provisions of R. S. 755 (U. S. C., Title 28, Sec. 455). This section provides that "The court, or justice, or judge to whom such application [application for writ of habeas corpus] is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." The petitioner argues that the writ should have issued because of the allegations in his petition and the subsequent controversy as to the facts involving his alleged waiver of the assistance of counsel arising from the return to the order to show cause and his answer thereto. The petitioner asserts, in effect, that because of the failure of the District Court to issue the writ he was deprived of the opportunity of appearing in court and of testifying and of cross-examining those who submitted the affidavits in support of the Government's claim of waiver. (See R. S. 756–761, U. S. C., Title 28, Secs. 456–461).

However, it has been often recognized that notwithstanding the peremptory language of R. S. 755, the courts are not deprived of discretion as to the time and mode in which they may exercise the powers conferred upon them and that they may consequently, in the exercise of their discretion, proceed to inquire into the legality of the petitioner's detention by the issuance of a rule upon the petitioner's custodian to show cause why the writ should not be

issued. *Ex parte Yarbrough,* 110 U. S. 651, 653; *Ex parte Royall,* 117 U. S. 241, 250–251; *Nivens* v. *Hudspeth,* 105 F. (2d) 756, 759 (C. C. A. 10th); *Murdock* v. *Pollock,* 229 Fed. 392, 393 (C. C. A. 8th); *Ex parte Collins,* 154 Fed. 980, 982–983 (C. C. Cal.), affirmed, 214 U. S. 113. The petitioner in the instant case has made no showing that the District Court abused its discretion by proceeding initially upon an order to show cause. Obviously upon the basis of the very general allegations in the petition for writ of habeas corpus (R. 5) the District Court was not in a position to determine whether the petitioner did or did not waive the assistance of counsel. Since, therefore, the issuance of the writ would not have resulted in the immediate discharge of the petitioner, the court was not required to issue it forthwith and was entitled to postpone consideration of the question as to whether the writ should ultimately be granted until it had received further light. Cf. *Ex parte Milligan,* 4 Wall. 2, 110–111; *Ex parte Royall, supra,* at p. 250, and other cases heretofore cited.

With reference to the petitioner's contention that in view of the issues made by the petition, the return to the order to show cause and the answer thereto, the writ should have been granted and a full hearing had upon those issues, we submit that the petitioner is not in a position to complain of the procedure which the District Court followed. As we have heretofore shown, petitioner was represented by counsel at all stages of the habeas corpus

proceeding following the filing of the return, and counsel was present and participated in the hearing and arguments which took place prior to the denial of the petition. At no time did petitioner's counsel present to the District Court any objection to the disposition by the court of the case upon the basis of the pleadings, accompanying exhibits, and argument. It may therefore be assumed that petitioner and his counsel fully acquiesced in the procedure followed and felt that nothing could be gained by the issuance of the writ and the holding of a further hearing. The District Court should not, of course, be put in error for following a procedure to which no objection was made on behalf of the petitioner.

There can be no doubt that, as was held by the Circuit Court of Appeals (R. 53), the District Court was justified in holding that the petitioner had waived the assistance of counsel.

The petition presents no question requiring review by this Court and therefore should, we respectfully submit, be denied.

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